

## Articles

# It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law

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## I. PRINCIPLES OF CORPORATE CRIMINALITY<sup>1</sup>

### A. Introduction

Baron Thurlow, an 18th Century Lord Chancellor of England, is reported to have exclaimed, "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be

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1. For detailed treatment of the issues discussed in this article, see K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* (1984). See generally, *CORPORATIONS AS CRIMINALS* (E. Hochstedler ed. 1984); *NEW DEVELOPMENTS AND PERSPECTIVES ON CORPORATE CRIME LAW ENFORCEMENT IN AMERICA* (L. Orland & H. Tyler eds. 1987). Among leading law review commentaries are Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976); Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141 (1983); Note, *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

kicked.” One report has him adding, “And, by God, it ought to have both.”<sup>2</sup> Less dramatically, a fragmentary “note” by Chief Justice Holt in 1701 states, “A corporation is not indictable, but the particular members of it are.”<sup>3</sup> Blackstone’s Commentaries were to the same effect.<sup>4</sup>

The disjunction between individual and corporate criminal liability was not surprising. In the law of torts, judges did not refine the principles of respondeat superior—under which one will be liable for acts done on its behalf—until the second half of the 19th Century.<sup>5</sup> Although this article will explore differences between civil and criminal principles of liability, the criminal law principles owe an evident and continuing debt to those developed on the civil side. In brief, a corporation—at least under federal law as it now stands—will likely be held criminally liable for acts of agents within the scope of their duties, but will escape liability if the agent was “going on a frolic of his own.”<sup>6</sup>

### *B. The Theoretical Basis of Corporate Criminal Liability*

The corporation is a capital-pooling device and its rise as a legal fiction is an essential part of economic development.<sup>7</sup> This is so whether the capital is in private or public hands—the corporate entity is a part of legal ideology in both capitalist and socialist legal systems. Inevitably, the debate over corporate liability is influenced by one’s personal views about corporations and their power over economic life, and by one’s theories of the best means of persuading corporate directors and management to enforce law compliance by employees. Management theory or microeconomics have more to tell us about such issues than does legal history.

While many analogies lie ready to hand, permitting one to justify a wide range of approaches to corporate criminal liability, they do not give us a rational basis for choosing one approach over another. If

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2. Quoted in Coffee, “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 at n.1 (1981) (discussing extensively competing theories of corporate criminal liability). See also Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Liability*, 19 U. PITT. L. REV. 21 (1957) (a learned critical and comparative study of corporate criminal liability by an early critic of traditional American theories).

3. Anonymous (No. 935), 88 Eng. Rep. 1518 (1701).

4. 1 W. BLACKSTONE, COMMENTARIES \*476.

5. 3 AM. JUR. 2D, *Agency*, §§ 270-95 (1986) (imputed negligence, respondeat superior and imputed knowledge).

6. This classic formulation is from *Joel v. Morison*, 172 Eng. Rep. 1338, 1339 (1834) (Parke, B).

7. See generally M. TIGAR, *LAW & THE RISE OF CAPITALISM* (1977).

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one is not simply to borrow principles of civil liability devised for other reasons, it becomes necessary to examine the rationale for making the corporate entity, as distinct from its human agents, guilty of a crime.

It is no universal solvent to declare that a corporation should be a criminal defendant because the aggregation of capital it represents poses a greater risk of harm if that power is used for criminal purposes. Such a rationale would support a decision to make the corporation civilly liable for its misdeeds, but sweeps little farther. There is, however, no question that this rationale underpins a great deal of federal law criminalizing corporate conduct. The decision to criminalize should not be made so casually. Criminal conduct, as Henry Hart reminded us, "is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."<sup>8</sup> Criminalizing a broad range of otherwise marginally acceptable business conduct trivializes the criminal sanction and breeds contempt for it, at least among rational actors, which most white collar offenders are.

### *C. Regulatory Offenses*

Regulatory offenses aimed at corporations have proliferated as part of administrative schemes enacted in the past half-century. Often they are part of a regulatory system that includes administrative, civil and criminal sanctions. Look, for example, to the fields of securities law, health, safety, and environmental control.<sup>9</sup> Most statutes in these fields reflect the rule that "Congress may in certain areas impose criminal liability for the mere doing of the proscribed act wholly unrelated to knowledge, actual or constructive."<sup>10</sup> In addition to punishing the corporation for conduct done without criminal intent, such statutes also permit prosecution of corporate managers for conduct they have merely "permitted" or tolerated.<sup>11</sup>

Regulatory statutes emphasize heavy fines. Typically, though not invariably, they are petty offenses or misdemeanors. Corporate

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8. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

9. Examples are collected in Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337 (1982).

10. *Standard Oil Co. v. United States*, 307 F.2d 120, 125 (5th Cir. 1962).

11. See Brickey, *supra* note 9. See also *United States v. Park*, 421 U.S. 658, 674 (1975) (conviction of supermarket executive upheld under Food, Drug & Cosmetic Act based upon his position in the company, which gave him authority "to deal with the situation"). *Park* presents the converse to the situation discussed in this chapter: the officer is held liable based upon wrongdoing that is attributed to the corporation.

liability is not triggered by conduct done with the intent to violate the law, or even necessarily with knowledge that harm is likely. There may be no "mens rea" requirement at all. In many cases, the harm could be redressed as well by private lawsuits or government-initiated civil/administrative proceedings.

The threat of the sanction, however, extends beyond the fine that may be involved, and can trigger administrative and civil settlements favorable to the agency, often in an effort to avoid the collateral estoppel consequences of an adjudication of guilt based upon a plea of guilty or a trial.

These "public welfare" offenses came into being out of a perception that modern business and industry had begun to create new dangers to public health and safety. The lack of a mens rea requirement reflects a legislative judgment that whoever courts such dangers should be charged with knowledge of the risks and of the requirements imposed by increasingly detailed statutes and regulations. It is wrong to say that one is "presumed" to know the rules, because a presumption must have some factual basis.<sup>12</sup> "Conclusive presumption" is an oxymoronic expression for "rule of law." In the criminal law, this point is made most clearly by the Supreme Court's decisions that one cannot presume that a defendant intended the consequences of his acts.<sup>13</sup>

Criminal sanctions under such circumstances sometimes betoken nothing more than a legislative determination to visit extra opprobrium on behavior that the legislation's sponsors find particularly galling. At a more studied level, the potential criminal sanction may confer added investigative authority on the agency charged with enforcement. The risk of criminal liability, even for a misdemeanor or petty offense, also carries the risk that the errors and omissions insurance of the corporate management and directors will not cover an alleged failure to supervise the responsible employees. Criminal exposure may carry adverse consequences in the securities and debt markets.

Because these statutory rules are myriad, each with a special body of lore, and because they describe "crimeless crimes"<sup>14</sup> that are traditionally spoken of as presenting exceptions to principles of criminal

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12. See, e.g., *United States v. Romano*, 382 U.S. 136, 139 (1965) (statutory presumption that presence at illegal still authorized conviction for possession, custody and control of still violates due process of law because basic fact not sufficiently related to presumed fact).

13. See, e.g., *Yates v. Aiken*, 484 U.S. 211, 213 n.2 (1988) (citing *Sandstrom v. Montana*, 442 U.S. 510 (1979)).

14. This is a characterization by Judge Brown of the facts of *Liparota v. United States*, 471 U.S. 419 (1985), in his cogent dissenting opinion in *United States v. Meyer*, 864 F.2d 214, 220 (1st Cir. 1988).

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statutory construction, they will make no further appearance in this article.

### *D. The Corporation and Serious Crimes*

I turn, therefore, to the corporation's liability for "true" crimes. Some crimes are thought to be, in their nature, "human," and could not be attributed to a corporation—"bigamy, perjury, rape . . . [and] murder" are often listed in this category.<sup>15</sup> While such limitations are arguable,<sup>16</sup> few would dispute that a corporation should be prosecutable for economic crimes committed in its name.

While, as noted above, theories of liability, and justifications for theories abound, one is necessarily speaking in a relative vacuum. It is difficult to prove that a particular theory of corporate criminal responsibility enhances compliance, redresses victim harm or deters others. This is, however, no reason to forego the inquiry.

When dealing with individual crime, we necessarily indulge an assumption about human beings: They are capable of rationally choosing to obey rather than break the law. We administer the criminal law "as if" this were true. The "as if" is far closer to demonstrated reality in the case of corporate crime. The typical corporate crime is undertaken as part of a plan to benefit the entity, and is usually the result of demonstrable economic calculation. The hope of benefit may be chimerical, and the risks far greater than the actor supposed, but it is easier to "see" the plan, like the strings of a puppet when one sits close to the stage. This has been a dominant assumption in construing criminal statutes applicable to corporations,<sup>17</sup> and the author's experience in representing corporations and their employees bears it out. If, therefore, risk of detection and punishment will be an element in the calculus of potential wrongdoing, making the corporation criminally liable can deter.

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15. Mueller, *supra* note 2 at 22.

16. *Id.* For example, if a corporate executive sexually assaults an employee as part of a pattern of harassment, one could certainly propound a rational theory that would make the corporation criminally liable for that act. In *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979), the defendant ran a bogus talent agency as a means of seducing women. Had the agency been incorporated, it, as well as its satirical owner, would both have been liable for wire fraud under federal law and fornication if the latter offense was part of state law. Corporations also routinely "swear" by their agents to the truth of statements and thus can be guilty of false statement offenses. See, e.g., *Nye & Nissen v. United States*, 336 U.S. 613 (1949) (corporation guilty under 18 U.S.C. § 1001 for submitting false statements).

17. See generally *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (intent requirement for liability under Sherman Act).

The next inquiry is, whose acts should bind the corporation and affix criminal liability. Powerful arguments are made that only acts commanded, encouraged, consented to or tolerated by relatively senior management should occasion liability.<sup>18</sup> The argument in favor of such a limitation is that only when management knows, or would have a reason to know, of illegality could they be expected to stop or prevent it. Therefore, deterrence is possible only under such circumstances. The Model Penal Code and many state penal codes adopt such an approach.

The counter-argument, which is accepted by the federal courts, and documented at length below, is that in the absence of a legislative provision to the contrary, the corporation should be liable for all acts done by any employee within the scope of duty and intended to benefit the corporation. This view is supported by at least three powerful considerations. First, the argument for a narrower rule is based upon unwarranted assumptions about corporate managerial behavior. Managers do not necessarily measure each transaction in the informed, rational fashion that is more typical of long-range planning. They do not, that is, sit down as the Chicago economists sometimes imagine and compute the benefits of crime, discounted by the product of the potential sanction and the risk of being caught. Indeed, considerable evidence suggests that managers make many decisions on a relatively ad hoc basis, seeking a path of consensus or "minimal hassle." This sort of decision-making lends itself peculiarly to decisions that appear to satisfy short-term needs perceived as urgent, while ignoring both the enterprise's ultimate interest and the law's requirements.

There is no single answer to this gap in the deterrent power of criminal sanctions, but one sure though partial remedy is to create a climate in the enterprise in which law-violation is repudiated and scorned. Management must make clear at every level that the enterprise does not want the proceeds of illegality.<sup>19</sup> Therefore, rules of corporate liability must encourage management to put such a preventive system in place. Such rules will inevitably affix criminal liability

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18. Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 FED. BAR J. 49, 53-56 (1979) (citing authorities). Perennial legislative proposals to adopt such a standard in federal law have drawn warm support. Philip Lacovana will soon publish an article supporting such legislation. A contrary view is taken in Comment, *The Foreign Corrupt Practices Act and Other Arguments Against a Due Diligence Defense to Corporate Criminal Liability*, 29 UCLA L. REV. 447 (1982).

19. As the former General Counsel of Mobil Corporation put it in a phone interview, "you have got to make clear that the company does not want the proceeds of dishonesty, and will sanction employees who break the law."

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for a far broader range of conduct than in the Model Penal Code formulation. They may also provide for fines and other punishment large enough to have a certain impact upon decision-makers. Corporate policy decisions taken at the top affect worker safety, environmental contamination, and hundreds of other important issues. When oil spills from a well blowout, does the lower-level manager think first of cleanup at all costs, or first about legalisms and shortcuts? The answer will depend not on specific managerial decisions, but on the corporation's internal culture. Broad rules of corporate criminal liability shape that culture towards law-abiding behavior at all levels of the structure.

Another argument for casting wide the criminal liability net arises from the operation of collateral estoppel. Much crime committed in the corporate name has widespread economic consequences. This is most obvious in the antitrust area, but may be seen as well in fraud, extortion, and some kinds of bribery. Ferreting out crimes of this sort is usually beyond the means and expertise of private plaintiffs. The human perpetrators typically act in what they suppose to be the corporation's interest and the corporation is typically the principal beneficiary of their criminal acts. The damage done may be spread among so many people that no one of them will have the economic motivation to seek redress. The barriers to class suits by such people are daunting.<sup>20</sup> Corporate liability for the criminal act is thus a means of promoting, encouraging and facilitating civil recovery. This is a legitimate function of government, provided always that in striving to make alleged victims whole we do not trivialize the criminal sanction.

A final, quite practical, justification for casting the net wide is this: If the corporation cannot be criminally liable without the complicity or at least acquiescence of top management, every corporate plea of guilty puts management at serious risk of a suit by the shareholders. Such a suit would usually be derivative, asserting the corporation's claim that the offending managers or directors should make the entity whole for what it had to pay in fines and legal fees.<sup>21</sup>

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20. For example, the class representatives must make a sizeable initial investment in notifying class members. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The required funds will be much easier to raise if the uncertainty as to result is diminished by a prior criminal prosecution of the defendants.

21. Treatment of derivative suit, business judgment and director/officer liability is beyond the scope of this article. The single most valuable resource on these issues is D. BLOCK, N. BARTON & S. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS & OFFICERS* (2d ed. 1988).

If, however, the corporation's guilt does not necessarily implicate management, the corporation can intercede with the government and negotiate a corporate plea agreement that will spare individuals from criminal prosecution. The corporation need not, under the broad view of liability, admit by such an agreement that management was at fault. Experienced practitioners know that early, effective advocacy is important when a corporation and its employees are under federal investigation. Often, the lawyer will reluctantly understand that the lengthy delay between a formal charge and the end of the process will itself impose unacceptable burdens on the company. This will be so even if the corporation is ultimately victorious. "You can beat the rap, but you can't beat the ride," as the trite old saying goes.

Pleading the corporation while not admitting management culpability will often be an acceptable compromise. While the corporation suffers the consequences of a criminal conviction, the limits of its liability are known and negotiated.

#### *E. Federal Law on Corporate Liability*

Title 1, United States Code, section 1 says that in Acts of Congress, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."<sup>22</sup> This statute provides the sole statutory justification for applying most criminal offenses, in title 18 of the United States Code and in other titles, to corporations.<sup>23</sup> These words provide Delphic guidance: At most they tell us whether a corporation might be prosecuted. They tell us nothing about when it is right to make it so.

Federal decisional law has firmly established, however, that the corporation will be guilty of a crime if an employee or employees, acting within the scope of their duties and with the intent to benefit the corporation, commit all the elements of the offense. As noted in Section II, there has been some erosion at the edges of this stark rule, but it remains virtually intact.

The federal rule is generally traced to the Supreme Court's decision in *New York Central Railroad v. United States*.<sup>24</sup> Although

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22. See Coleman, *Is Corporate Criminal Liability Really Necessary*, 19 Sw. L.J. 908, 913 (1975).

23. *Id.* at 913 n.32 (citing *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958)); *Alamo Fence Co. v. United States*, 240 F.2d 179 (5th Cir. 1957).

24. 212 U.S. 481 (1909).



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the Court's reasoning was foreshadowed in earlier federal and state cases,<sup>25</sup> *New York Central Railroad* did not involve the general federal criminal law at all. The railroad was indicted, along with its assistant traffic manager, for violation of the Elkins Act.<sup>26</sup> The manager had paid illegal rebates to shippers, apparently as an inducement to do business.

The Elkins Act provided that a corporation would be deemed guilty of any statutory misdemeanor committed by any of its officers, directors, employees or agents. In addition, the Act provided that "the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person."<sup>27</sup>

The railroad's principal argument was that the statute transgressed upon the due process clause because "to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard."<sup>28</sup> The corporation's lawyers also argued that the statute deprived it of the presumption of innocence.

The Court noted that Holt and Blackstone had declared the corporation not capable of crime, but that "the modern authority, universally, . . . is the other way."<sup>29</sup>

Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.<sup>30</sup>

The Court summarized the respondeat superior law of tort as attributing to the corporation all acts of agents within the scope of their employment. This is the rule even when the agent acts "wantonly or recklessly or against the express orders of the principal. In such cases, liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the

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25. See cases cited at 212 U.S. at 487 (excerpt from government brief).

26. Elkins Act, ch. 708, 32 Stat. 847 (1903).

27. 212 U.S. at 491-92.

28. *Id.* at 492.

29. *Id.*

30. *Id.* at 492-93 (quoting BISHOP, NEW CRIMINAL LAW § 417).

principal.”<sup>31</sup> A writing or board resolution is not necessary to confer upon the agent this power to create liability.

The Court then took the leap that planted federal law firmly on the shore where the law still rests:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent . . . may be controlled, in the interest of public policy, by imputing his act to the employer and imposing penalties upon the corporation for which he is acting . . . .<sup>32</sup>

Implicit in this analysis is a rejection of the corporation's constitutional arguments. The corporation acts, for good or ill, through agents, and the shareholders must accept all the consequences of the form of business in which they have chosen to invest.

The holding of *Central Railroad* has been followed without question in the succeeding decades.<sup>33</sup> Of course, the corporation must be proven to exist.<sup>34</sup> Once that proof is made, no matter how low in the corporate hierarchy the offending agent may have been, her or his acts are imputed to the entity.<sup>35</sup> For example, in *CIT Corp v. United States*,<sup>36</sup> the court of appeals rejected the corporation's argument that a branch manager of a major national company could not make the corporation liable for a conspiracy to submit false loan documents to a federal agency. There is a district court decision holding that the

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31. 212 U.S. at 493.

32. *Id.* at 494. The Court went on to explain:

It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them.

*Id.* at 494-95.

33. See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962). For a brief but authoritative discussion, see Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129 (1984).

34. See, e.g., *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959) (under the law of their states of incorporation, the defendant dissolved entities had enough "existence" to be proper Sherman Act defendants).

35. See, e.g., *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946); *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975); *United States v. Steiner Plastics Mfr. Co.*, 231 F.2d 149, 152 (2d Cir. 1956); *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 393 (1st Cir. 1955); *United States v. Armour & Co.*, 168 F.2d 342 (3d Cir. 1948). See cases collected in Brickey, *supra* note 33 at 131 n.11; Elkins, *supra* note 1, at 103.

36. 150 F.2d 85, 89 (9th Cir. 1945).

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culpable involvement of someone in a managerial capacity would be necessary to hold a corporation guilty of conspiracy.<sup>37</sup> But the Fifth Circuit's opinion reversing the case on other grounds leaves no doubt that this position is insupportable.<sup>38</sup>

The corporation may even be criminally liable for acts done in flat violation of company policy and the direct instructions of the offender's superior.<sup>39</sup> Indeed, the employee's acts need not have conferred a benefit on the corporation.

[B]enefit is evidential in determining the purpose and motive for which the agent does the act in question. If it is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse.<sup>40</sup>

One may intuitively grasp the concept of imputing an agent's actions to the principal, particularly when the principal is a legal fiction that cannot "act" except through humans. Attribution of the agent's "knowledge" and "intent" poses more difficult problems. Moreover, attribution becomes more problematic when several employees participated in the conduct that is claimed to have been criminal. This issue has been the subject of several important federal cases.

In *United States v. TIME-DC, Inc.*,<sup>41</sup> the corporation was found guilty of knowingly and willfully violating a federal regulation that forbade requiring or permitting an interstate truck driver from operating the truck while fatigued or ill or likely to become so. The company had begun a policy to discourage absenteeism, and required drivers to obtain a doctor's note for claimed illnesses. Two drivers called in sick. The dispatcher told them their absences were unexcused, and may not have informed them that they could cure this situation by obtaining a doctor's letter. Both drivers decided to come to work. Both were, the court found, actually ill. The court concluded that the company had a policy of not notifying drivers that they could obtain doctor's excuses for absences.

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37. *United States v. Thompson-Powell Drilling Co.*, 196 F. Supp. 571 (N.D. Tex. 1961), *rev'd on other grounds sub nom.* *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962).

38. 307 F.2d 120 (5th Cir. 1962). *See generally* Brickey, *supra* note 33.

39. *See supra* text accompanying notes 82-90.

40. 307 F.2d at 128-29.

41. 381 F. Supp. 730 (W.D. Va. 1974).

The company officials all testified that they knew of the federal regulation on fatigued or ill drivers. The regulation was known at all levels of the company, even by the drivers, who were independently obliged to obey it. The court rejected the company's contention that "willful" meant the specific intent to violate a known legal duty, as is the case under many federal felony statutes. Proof of pervasive awareness of the regulation sustained the government's burden on this element.

The main issue, therefore, was whether the corporation had "knowledge" of the drivers' condition and required them to work anyway. In language that has often been cited, the court set out a "collective knowledge" theory:

[K]nowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then should have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.<sup>42</sup>

The court found that the corporation "through its various employees" knew that one of the drivers was sick.<sup>43</sup> In reaching this conclusion, it recognized that in the usual case, a collective knowledge requirement makes sense because the "knowledge" at issue has been embodied in writings available to all the employees whose conduct is being considered. But the court said the same rule should apply even where there were no writings. This is justified as a means of enforcing the policy of the federal regulations concerning unsafe driving.

*TIME-DC* can be defended as involving a regulatory misdemeanor with a relatively trivial intent requirement. It seems reasonable to put a duty on the corporation to see that information about drivers' physical condition is shared among all those responsible for putting the trucks on the road. The *TIME-DC* analysis has, however, been extended into the realm of traditional felony jurisprudence.

In *United States v. Bank of New England, NA*,<sup>44</sup> the court of appeals affirmed the bank's conviction of thirty-one felony charges of

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42. 381 F. Supp. at 738-39, citing *Steere Tank Lines, Inc., v. United States*, 330 F.2d 719 (5th Cir. 1963); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958); *Inland Freight Lines v. United States*, 191 F.2d 313 (10th Cir. 1951).

43. 381 F. Supp. at 739.

44. 821 F.2d 844 (1st Cir.), *cert denied*, 484 U.S. 943 (1987).

failing to file reports of bank customer currency transactions of \$10,000 or more, as part of a pattern of such law violations.<sup>45</sup> The statute requires the government to prove that the violations were done “willfully,” and caselaw interprets this to mean “proof of the defendant’s knowledge of the reporting requirements and his specific intent to commit the crime.”<sup>46</sup> There was no question that a single bank employee knew that each transaction involved at least \$10,000: The customer whose transactions were at issue had brought in several checks totalling over \$10,000 and cashed them with a single teller, who “would transfer to him in a single motion a wad of cash totalling more than \$10,000.”<sup>47</sup>

The tellers who handed out the cash, and the patron who received it, were acquitted by the jury. The bank was convicted based on instructions that permitted aggregating the knowledge of several employees to equal specific intent. This is obviously a different inquiry than in *TIME-DC*, where the statute required only knowledge of the drivers’ physical condition. In a corporation, reporting of facts on which a decision is based flows down to managers and up to senior management. It is in that sense that the *TIME-DC* court invokes the image of collective knowing: the only relevant knowledge is whether the driver is sick, a one dimensional factual inquiry.

By contrast, *Bank of New England* involves felony liability requiring proof of intent to violate a known legal duty. Since the elements of a legal duty may be innocent in themselves, dividing knowledge erodes one’s certainty that any employee acted with a sense of wrongfulness.

Yet, the court of appeals quoted *TIME-DC* at some length, and held:

A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.<sup>48</sup>

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45. 31 U.S.C. § 5322 (West Supp.1989).

46. 821 F.2d at 854 (quoting *United States v. Hernando Ospina*, 798 F.2d 1570, 1580 (11th Cir 1986)).

47. 821 F.2d at 848-49.

48. *Id.* at 856 (citing *T.I.M.E.-DC*, 381 F.Supp. at 738).

The court rejected the bank's argument that it was in effect being punished for "negligently maintaining a poor communications network".<sup>49</sup>

On the issue of intent to violate the law, the court of appeals upheld a jury instruction that permitted conviction if (a) one bank employee acted with the specific intent to violate the law, or (b) the "failure to file was the result of some flagrant organizational indifference."<sup>50</sup>

*Bank of New England* appears to stretch the logic of *TIME-DC* beyond recognition. The felony sanction is generally reserved for serious conduct that is undertaken in deliberate defiance of the law: no matter what the evil, we do not punish the evil-doing hand unless it was actuated by the evil-meaning mind. The principle of lenity—also called strict interpretation of criminal statutes—is routinely invoked to reflect this social value. When Congress puts a felony offense at the top of a pyramid of administrative and civil enforcement, the Supreme Court takes this as a signal to eschew the sort of "public welfare offense" ideology that is reflected in *TIME-DC*. The "duty to find out the facts and law and obey" has little place in felony cases. Any other rule is not only hostile to the constitutional protections that are to accompany and precede decisions in criminal cases, but also risks trivializing the criminal sanction.<sup>51</sup>

In *Bank of New England*, the court approved jury instructions that would permit a conviction when nobody in the bank knew that multi-check transactions of \$10,000 or more violated the law, but where the knowledge of many bank employees of small parts of the legal requirements could be aggregated to a hypothetical sum equal to such knowledge.

Consider the effect of such an instruction in a typical Sherman Act Section 1 conspiracy case.<sup>52</sup> The Act requires that the government prove that the defendant knew of the anticompetitive effect of the challenged behavior.<sup>53</sup> If the corporation may be found guilty by aggregating the knowledge of many employees, none of whom individually knows enough to trigger any suspicion that something wrong is going

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49. 821 F.2d at 856.

50. *Id.* at 855.

51. See *supra* text accompanying note 8.

52. 15 U.S.C. § 1 (1988). See, e.g., *United States v. United States Gypsum Corp.*, 438 U.S. 422 (1978).

53. See *United States Gypsum*, 438 U.S. at 445-46.

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on, the criminal sanction will utterly fail to deter: nobody will have any basis to take preventive measures.<sup>54</sup> A collective knowledge theory would permit punishment of the corporation based upon the combined conduct of individuals, each of whom is engaging in behavior that they may legitimately feel is laudable in terms of antitrust policy goals.

More troubling is the court's approval of an intent instruction that penalizes indifference. When willfulness is an element, the defendant must be proven to have desired a result known to be unlawful. Proof of indifference may help the jury to infer that the defendant had such a desire. Some courts have approved—often with trepidation—so-called “ostrich” jury instructions, that such an inference is permissible.<sup>55</sup> Going beyond the “ostrich” charge to tell a jury that indifference may equal intent amounts to saying that one is presumed to intend consequences to which one is indifferent. That sort of presumption strikes directly and probably unconstitutionally at the requirement of proof beyond a reasonable doubt of each element of the offense.<sup>56</sup>

On the facts of *Bank of New England*, one is tempted to say that no harm was done. The temptation should be avoided. While the court of appeals stressed evidence that management was hostile to the currency transaction reporting requirements, its unwise rule of law cannot be justified by noting that some particular defendant is unworthy.<sup>57</sup> The facts allegedly showing the bank management's disingenuousness might well have convinced a jury that management had the specific intent to violate the law. It is, however, far more likely that the bank management was simply indulging a questionable but honestly-held belief that the law meant that in multi-check transactions the reporting requirements are not triggered: a belief that negates the intent to violate the law.<sup>58</sup>

Predictably, the responses to *Bank of New England* have been

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54. More seriously, the Supreme Court emphasized in a leading Sherman Act case that some exchanges of pricing information may be procompetitive. *United States Gypsum*, 438 U.S. at 441 n.16.

55. See, e.g., *United States v. Diaz*, 864 F.2d 544, 549-50 (7th Cir. 1988) (trial court's use of conscious avoidance or “ostrich” instruction not reversible error).

56. See generally *Sandstrom v. Montana*, 442 U.S. 510 (1979); *United States v. Adamson*, 700 F.2d 953 (5th Cir.), cert. denied, 464 U.S. 833 (1983). See also *Miller*, *supra* note 18, at 57-58.

57. “[W]e cannot dispense with constitutional privileges because in a specific instance they may not in fact serve any valid interest of their possessor . . . . All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused . . . .” *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950).

58. It must be noted, however, that *Gypsum* has been held not to change the standards for imputing employee intent to the corporate employer. *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th

mixed. John Villa, author of a leading treatise on banking crimes, has strongly and cogently criticized the decision for eroding traditional *mens rea* principles.<sup>59</sup> In the same symposium, three authors urge that the rationale of *Bank of New England* be extended to defective pricing cases against defense contractors.<sup>60</sup> The view that "a corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual" was restated in *First Equity Corp. v. Standard & Poor's Corporation*.<sup>61</sup>

Corporations are subject to myriad legal duties defined in thousands of sets of laws and regulations. In seeking to accommodate the desire to make a profit with the desire to steer clear of law violation, they will often calculate with some care the line between legality and illegality. They may take fairly aggressive stances on the meaning of complex laws. This attitude may be seen most clearly in the income tax area. While civil or even misdemeanor liability will justly await the management that guesses wrong, a strong tradition counsels against bestowing felony status.

#### F. Model Penal Code and State Laws

The Model Penal Code,<sup>62</sup> which has been the basis for recodification of the criminal law in most states,<sup>63</sup> imposes criminal liability upon a corporation under three circumstances. First, the corporation will be liable for a petty offense or for a crime defined by some statute other than the Code on the basis of an agent's conduct within the scope of employment.<sup>64</sup> This provision tends to limit penal liability to instances in which the legislature has specifically expressed the intention of punishing corporations. Second, the corporation will be liable if "the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law."<sup>65</sup> Third, the

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Cir.), *cert denied*, 464 U.S. 956 (1983); *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert denied*, 454 U.S. 1083 (1981).

59. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes*, 37 CATH. U.L. REV. 489, 497-500 (1988).

60. Shirk, Greenberg & Dawson, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts*, 37 CATH. U.L. REV. 935, 977-79 (1988).

61. 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988).

62. Model Penal Code (Proposed Official Draft 1962). For a brief history of the Code's corporate liability provisions, see Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988).

63. See generally Brickey, *supra* note 62, at 633-34.

64. Model Penal Code § 2.07(1)(a).

65. Model Penal Code § 2.07(1)(b).



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provision that applies to most criminal statutes under which a corporation might be charged imposes liability if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his office or employment."<sup>66</sup>

The Model Penal Code's wide acceptance in the states has not extended to these provisions limiting criminal liability. Professor Brickey's compilation of state statutes following the Code reveals that a number of them have to one degree or another added language that more nearly approaches the federal rule.<sup>67</sup> A leading treatise on corporate law states flatly that "[m]ost state courts apply the same respondent superior principles to corporate liability as the federal courts."<sup>68</sup>

Detailed treatment of state law differences is beyond the scope of this article; individual state statutes vary considerably.<sup>69</sup> However, Model Penal Code and federal law positions account for a great majority of the state rules, so a working knowledge of these two alternatives is adequate for most purposes.<sup>70</sup>

## II. DEFENSES TO CORPORATE CRIMINAL LIABILITY

### A. *No Intent to Benefit the Corporation*

While the agent's conduct need not have actually benefitted the corporation,<sup>71</sup> the intent to benefit must be proven. If the agent is

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66. Model Penal Code § 2.07(1)(c).

67. Brickey, *supra* note 62, at 633-34. See also, Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J. OF LAW, ETHICS & PUB. POL'Y 753 (1987).

68. 10 W FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4942 at 620-21 (perm. ed. 1978).

69. See generally Note, *Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1972). Representative state statutes include ARIZ. REV. STAT. ANN. § 13-305 and § 5-2-502(3)(A) (1987); ARK. STAT. ANN. §§ 41-401 - 41-403 (1987); COLO. REV. STAT. § 18-1-606 (1986); DEL. CODE ANN. tit. 11, §§ 281(3)a & b, and tit. 11, § 284(b) (1987); GA. CODE ANN. § 16-2-22 (1984); HAW. REV. STAT. § 702-227(3) (1985); ILL. REV. STAT. ch. 38, para. 5-4 (1989); IND. CODE ANN. § 35-41-2-3 (Burns 1986); IOWA CODE § 703.5 (1979); KAN. STAT. ANN. § 3206 (1981); KY. REV. STAT. ANN. § 502.050(1)(c) (Baldwin 1987); MO. REV. STAT. § 562.056 (1986); MONT. CODE ANN. § 45-2-311 (1987); N.J. STAT. ANN. § 2C:2-7 (West 1982); N.Y. PENAL LAW § 20.20 (Consol. 1987); N.D. CENT. CODE § 12.1-03-02 (1985); OHIO REV. CODE ANN. § 2901.23(c) and § 2901.23(A)(4) (Anderson 1987); OR. REV. STAT. § 161.170 (1987); 18 PA. CONS. STAT. ANN. 307(a)(1) (Purdon 1983); TEX. PENAL CODE ANN. § 7.22(a)(2) (Vernon 1974); WASH. REV. CODE ANN. § 9A.08.030 (1988).

70. For a critical view of both federal and state rules, see Mueller, *supra* note 2 (noting that most civil law jurisdictions do not impose criminal liability on corporations at all). See also Brickey, *supra* note 62, at 596.

71. See also *Old Monastery Co. v. United States*, 147 F.2d 905 (4th Cir.), *cert denied*, 326 U.S.

acting in violation of the fiduciary duty owed the corporation, for example in order to gain personal profit, the corporation will not be chargeable with his conduct.

The leading case is *Standard Oil Company of Texas v. United States*.<sup>72</sup> Based upon the conduct of three of its employees, Standard Oil and an affiliated pipeline company were indicted for violation of the Connally Hot Oil Act.<sup>73</sup> The employees made up false run tickets that misstated the amount of crude oil produced from wells owned by the Thompson Corporation and pumped through Standard's facilities. The scheme permitted Thompson to produce more oil than was allowed under federal law. Thompson paid the Standard employees for falsifying the tickets.

The Fifth Circuit reversed the convictions of Standard and its affiliate. Judge Brown acknowledged that the knowledge gained by employees is usually imputed to the corporation, as well as the intent with which the employees act. But, he said, this principle applies only when the employee is acting within the scope of employment:

Under a statute requiring that there be "a specific wrongful intent," and the "presence of culpable intent as a necessary element of the offense . . . , the corporation does not acquire that knowledge or possess the "requisite state of mind essential for responsibility," through the activities of unfaithful servants whose conduct was undertaken to advance the interests of parties other than their corporate employer.<sup>74</sup>

The decisive fact in reversing the convictions was not that Standard and its affiliate in fact received no benefit, nor even that they were compelled to pay twice for oil purportedly received from Thompson. Rather, the employees "intended" no benefit, and were faithlessly violating their fiduciary duty. *Standard Oil* has been followed in the Fifth Circuit, and in other circuits that have considered the issue.<sup>75</sup>

*Standard Oil* provides a "game plan" for the corporation charged with wrongdoing, whether in a criminal case or in a civil action—such as RICO—based upon alleged criminality. Consider, for example, a scheme in which an employee has agreed to a territorial division or

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734 (1945); *United States v. Empire Packing Co.*, 174 F.2d 16 (7th Cir.), cert. denied, 337 U.S. 959 (1949).

72. 307 F.2d 120 (5th Cir. 1962).

73. 15 U.S.C. § 715 (1976) (original version at ch. 18, § 1, 49 Stat. 30 (1935)).

74. 307 F.2d at 129 (citing *Boyce Motor Lines, Inc., v. United States*, 342 U.S. 337, 342 (1952); *United States v. Chicago Express, Inc.*, 235 F.2d 785, 786 (7th Cir. 1956)).

75. See, e.g., *United States v. DeMauro*, 581 F.2d 50 (2d Cir. 1978). *Standard Oil* was reaffirmed in *United States v. Ridglea State Bank*, 357 F.2d 495, 498-500 (5th Cir 1966).

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price-fixing scheme, and is then personally involved in carrying out the plan. Arguably, such conduct is designed to improve the corporate employer's profit picture, and therefore to benefit it.

When the accusations are made, the corporation faces a decision on strategy that must be made early and applied consistently. It must decide whether to admit wrongdoing and settle potential litigation, fight on the basis that no law was violated, or claim that the errant employees were acting for their own and not the entity's interest. Early decision is necessary because the strategy chosen dictates fact-finding tactics, attorney selection, and attitudes towards the defense of the alleged individual wrongdoers.<sup>76</sup>

In the hypothetical above, the company should look for evidence that the employee was profiting personally from the anticompetitive behavior, for example by using the unlawful agreement to carve out a sales territory in a way that increased his own compensation and improved his position in the company. Often, the errant employee will also have falsified expense and time reports in order to mask his unlawful activity, or even to pocket additional cash. Diligent and aggressive investigation may even disclose that the employee is in concert with others to start up or aid a competing business, or is receiving kickbacks from the competitor. It is likely, however, that the evidence that the employee had no intent to benefit the corporation will seldom be overwhelming.

### *B. Lack of Authority*

The issue of lack of authority is obviously related both to that of intent to benefit the corporation and that of actions contrary to corporate policy. After all, an agent is expected to seek to benefit the corporation, and the agent's authority cannot be defined other than by instructions on policies and procedures to be followed. The issue is worthy of separate consideration, however, because it is usually treated separately in criminal jury instructions, and is a recognized topic in the general corporate law.

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76. It is beyond the scope of this article to discuss defense tactics in detail. If the corporation is to claim that an employee violated a fiduciary duty, it will have a more difficult time justifying reimbursing that person's legal fees, and even in continuing to employ that person. The answers to such questions depend upon the law of the state of incorporation, as well as upon strategic considerations. *But see* *Commissioner v. Tellier*, 383 U.S. 687 (1966) (taxpayer may take deduction for legal fees in unsuccessful defense against business-related criminal charges). The employee "cut off" or "tossed out" might decide to gain revenge by making accusations against people more senior in the company: This is known as the "I confess! He did it!" phenomenon.

The case law upholds quite broad instructions on agency in the criminal setting.<sup>77</sup> For example, in *United States v. American Radiator & Standard Sanitary Corp.*,<sup>78</sup> the court of appeals upheld a jury instruction that said in part:

In order for a corporation to be responsible for the acts or statements of one of its agents it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their employment or their apparent authority . . . . Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.<sup>79</sup>

The court was careful to insist that the corporation is entitled to separate instructions, requiring the government to prove "both that the agents' acts were within his authority, *and* within the course of his employment, that is, performed with the intention of benefitting the corporation."<sup>80</sup>

This dual burden will have little importance in most cases. Consider, for example, the case of a lower-level employee who hears the company is being investigated, and who fears that incriminating documents are in the company's files. The employee removes and destroys the documents. The conduct is clearly done with the intent to benefit the corporation, but the employee's job description and responsibilities may exclude any duty or right to make decisions about keeping documents. While the law of apparent authority, borrowed from the rules applicable to civil cases, is skewed in favor of finding that authority exists, the issue is worth a second look in a criminal case.

The government in such a case must prove both prongs of the agency basis for corporate responsibility, and the proof must be beyond a reasonable doubt.<sup>81</sup> This burden can be significant when seeking to convince a judge—or a jury. The jury, hearing both of the employee's lowly status and of corporate policies forbidding all employees from

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77. See, e.g., *United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir.), cert. denied, 464 U.S. 956 (1983); *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962); Brickey, *supra* note 33, at 131.

78. 433 F.2d 174, 204-05 (3d Cir. 1970).

79. *Id.* at 204.

80. *Id.*

81. *Id.* at 205.

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document destruction, may well have a reasonable doubt either about the employee's mental state or his authority.

### *C. Actions Contrary to Corporate Policy*

Despite the Model Penal Code formulation, and scholarly<sup>82</sup> and judicial<sup>83</sup> criticism, federal courts continue to subject corporations to criminal liability even for acts contrary to corporate policy. A leading case is *United States v. Hilton Hotels Corp.*<sup>84</sup> Western International Hotels Company, along with other operators of hotels, restaurants and allied businesses, organized to attract convention business to Portland, Oregon. They persuaded suppliers to contribute by refusing to deal with those who would not contribute and directing their patronage towards givers. This was, according to the court of appeals, a per se violation of the Sherman Act.

Western International's president and hotel manager testified that the hotel bought supplies based only on price, quality and service. They had instructed the hotel's purchasing agent to have nothing to do with the boycott. The agent said that he had disobeyed these orders, "because of anger and personal pique toward the individual representing the supplier."<sup>85</sup>

The court nonetheless upheld the corporation's criminal conviction, and approved the trial judge's rejection of jury instructions that would have limited corporate liability for an agent's unauthorized act. The instructions rested instead on concepts of apparent authority,<sup>86</sup> and expressly said:

A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies.

*Hilton* has been cited repeatedly, ostensibly in approval of this broad language.<sup>87</sup>

Commentators have argued that *Hilton* goes too far because it

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82. See, e.g., Miller, *supra* note 18 at 68; Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L.J. 547 (1962); Hamilton, *Corporate Criminal Liability in Texas*, 47 TEX. L. REV. 60 (1968). Professor Hamilton is not only an authority on corporate law, but a dedicated proponent of responsible corporate governance; his views are therefore entitled to weight.

83. See Miller, *supra* note 18 at 62-63 and cases cited.

84. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

85. *Id.* at 1004.

86. See *supra* text accompanying notes 77-81.

87. See, e.g., *United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir.), *cert. denied*, 409 U.S. 1125 (1983); *United States v. Gibson Products Co.*, 426 F. Supp 768 (S.D. Tex. 1976).

expressly forbids the corporation from relying upon its internal compliance policies.<sup>88</sup> After all, the argument runs, corporations should be encouraged to have such policies, and to take steps to enforce them. One answer to this contention is that the existence of such policies will probably be taken into account by prosecutors in making the discretionary decision whether or not to charge the corporation.

Whether or not one agrees with such policy-based criticism, the *Hilton* instruction is wrong unless the "is responsible" is read as meaning "may be responsible." A corporate compliance policy, broadly distributed to employees, is surely evidence that employees' authority does not extend to acts in violation of the policy. While contrary evidence may show that the policy was in fact administered with a knowing wink and a conspiratorial nod, that is a far different matter from rejecting its relevance altogether.

The argument will be stronger if the compliance policy is made known to the company's customers, suppliers, rivals and co-venturers. For then the "outsider," by whose imagined perception apparent authority is judged, cannot plausibly be said to believe the lawbreaking agent is acting for the corporation.

The view that compliance policies are relevant has been accepted. In *United States v. Basic Construction Co.*,<sup>89</sup> the court noted that "[i]n the instant case, the district court properly allowed the jury to consider Basic's alleged antitrust compliance policy in determining whether the employees were acting for the benefit of the corporation."<sup>90</sup>

### III. OTHER ASSOCIATIONAL LIABILITY ISSUES

A corporation may be liable for the criminal acts of subsidiaries and divisions.<sup>91</sup> Even though the Supreme Court has limited the

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88. See, e.g., Miller, *supra* note 18, at 61-68. Miller relies on *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946), which rejected the *New York Central* rule as resting upon the unique language of the Elkins Act. The court contrasted the language of the wartime act at issue in *Holland* and acquitted the company based upon evidence of its good faith effort to control the activity of its agents. *Id.* at 6-8. *Holland* is badly-reasoned in rejecting the authority of *New York Central*, and is in any event of little generative force due to its reliance on the language of the special statute it was construing.

89. 711 F.2d 570 (4th Cir.), *cert. denied*, 464 U.S. 956 (1983).

90. *Id.* at 573.

91. See Obermaier, *Vicarious Liability of Corporations and Corporate Officers*, in *NEW DEVELOPMENTS AND PERSPECTIVES ON CORPORATE CRIME LAW ENFORCEMENT IN AMERICA* 51, 82-84 (L. Orland & H. Tyler eds. 1987); Brickey, *supra* note 33, at 133-34.

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doctrine of the intracorporate conspiracy in the antitrust setting,<sup>92</sup> the scope of this doctrine is uncertain as applied to ordinary crimes.

A corporation may be liable for the criminal conduct imputed to a newly-acquired subsidiary or division, and based on acts done before the acquisition. In *United States v. Wilshire Oil Company of Texas*,<sup>93</sup> Wilshire had purchased Riffe Petroleum Company and operated it as an unincorporated division. Before the purchase, a Riffe employee had joined in a conspiracy to rig bids on liquid asphalt. The evidence showed, according to the court of appeals, that Wilshire had at least ratified the agent's conduct.<sup>94</sup> It is difficult to tell if the court of appeals held Wilshire criminally liable because it found evidence of post-acquisition conscious wrongdoing by Wilshire-Riffe, or because Wilshire "took the conspiracy as it found it" and should have been more diligent in detecting and disavowing the benefits of the deal. But the case stands as a warning in that all corporate closets should be searched before the new family moves in.

This sort of "flow-through" liability has been sustained in criminal prosecutions of successors to failed banks. In *United States v. Central National Bank*,<sup>95</sup> the court held that the surviving bank was criminally liable for criminal currency violations committed by the institution with which it had merged.

One must also note that the breadth of 1 USC § 1 extends more broadly than "corporations." While most students of corporate criminal law know that under the RICO statute any sort of entity may be an "enterprise,"<sup>96</sup> fewer may know that all "impersonal entities"<sup>97</sup> may be subjected to criminal liability. The Supreme Court, finding a partnership guilty of a crime, stressed that the same rule of imputing agents' activities will be applied in order to deny "the fruits of violations" to "the treasury of the business."<sup>98</sup>

## IV. CONCLUSION

Lawyers—especially litigating lawyers—learn early in their careers that the facts do not announce themselves, but must usually be

92. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (rejecting intracorporate conspiracy doctrine in the antitrust area).

93. 427 F.2d 969 (10th Cir.), cert. denied, 400 U.S. 829 (1970).

94. *Id.* at 973-74.

95. 705 F. Supp. 336 (S.D. Tex. 1988). The court does not cite *Wilshire*.

96. 18 U.S.C. § 1961 (4) (1970); *United States v. Turkette*, 452 U.S. 576, 581-83 (1981).

97. *United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958).

98. 358 U.S. at 126.

culled from the shifting memories of witnesses and the ambiguous traces left in documents. This inherent ambiguity need not be daunting. Defense against charges of wrongdoing, at the stage of negotiating an end to trouble and in litigation, involves "hat hanging." The lawyer is looking for a plausible peg on which the prosecutor or the jury can hang its hat.

Earnest and cogent critics will seek to change federal law to resemble the Model Penal Code formulation. For the reasons given, I think such a change would be an error. I prefer instead a more modest approach. The present federal rules encourage management to adopt and enforce procedures to deter and detect law violations done on the corporation's behalf. Often, the existence and effectiveness of such policies will convince a prosecutor to forego bringing a criminal case.

When the corporation is brought to trial, however, it should be permitted to put its policies before the jury. Nominally, the jury will be asking whether the human agent acted with intent and within his authority. We must not, however, forget that this two-sided inquiry is directed at resolving the issue of imputed intent—did the corporation act with a culpable mental state. On that issue, the latitude of introducing evidence has traditionally been broad.

If the corporation elects to put its good faith in issue, it must be held to have opened the door to other misdeeds that show its policies to be ineffective or cynical. With the issue opened up in this way, the jury's decisionmaking in corporate crime cases would more nearly resemble that of the ordinary criminal case in which the defendant takes the stand or puts on character evidence. This approach not only encourages management to have policies on wrongdoing, but to police them in ways that will convince a bystander that they mean what they say.